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In the

Supreme Court of the United States

OCTOBER TERM, 1901.

THE LOUISVILLE TRUST COMPANY, TRUSTEE, ETC., v. LEONARD COMINGOR.	No. 809. On writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR LEONARD COMINGOR.

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STATEMENT OF THE CASE.

On the 14th day of February, 1899, Sinsheimer, Levinson & Co., and others, filed their petition in the District Court of the United States, at Louisville, against Simonson, Whiteson & Co., seeking to have said defendants adjudged bankrupts, alleging that on December 5, 1898, they had made a deed of assignment of their property, for the benefit of their creditors generally, to Leonard Comingor, who was made a party defendant to said petition, but no relief was sought or prayed as against him, and on March 21, 1899, he moved the

court to dismiss said petition as to him, because the court had no jurisdiction, and without waiving said motion, tendered an answer, but the motion was never acted on, nor was his answer ever filed, but his name was simply dropped out of the case, by common consent.

To this petition defendants, Simonson, Whiteson & Co., tendered answer, which was afterwards filed, and on the 20th day of September, 1899, said defendants were finally adjudged bankrupts, and on May 17, 1900, the case was referred to Baskin, referee.

Said referee, on May 28, 1900, without notice, entered an order directing said Comingor to file an itemized statement of his receipts and disbursements as such assignee, and to appear before said referee to settle his said accounts, and said Comingor did then furnish said referee said statement, as required, and the same showed that he realized from said assets $92,865.77, before the filing of the proceedings in bankruptcy, said amount being more than 22 per cent over the appraised value of said estate. That he had disbursed thereof $19,876.73; that he drew as his commission $3,398.90, and paid his counsel $3,200.00; *all before any proceedings in bankruptcy*

On June 20, 1900, the referee, on his own motion, entered an order appointing The Louisville Trust Company receiver.

Said Comingor having a suit then pending since

1898, in the Jefferson Circuit Court for the settlement of his trust, and having paid the net amount collected into court, the said referee, on June 20, 1900, directed said receiver to apply to said court for said entire fund.

On June 21, 1900, a notice was served on said Comingor that said receiver would that day make a motion in the state court (Jefferson Circuit Court) to withdraw said fund, and at the same time he was served with an injunction issued from the district court, enjoining and restraining him from making any opposition to said motion. Said motion was then entered in the state court, and on June 30, 1900, was refused, because said receiver was not a party to said suit. On July 3, 1900, said receiver, having been appointed trustee, filed his petition in the said settlement suit of said Comingor pending in the state court, and asked to be made party defendant thereto, and that said petition be taken as his answer, and that he be allowed to withdraw said fund; and on July 5th all this was done and the fund withdrawn.

Said referee on said June 20, 1900, on his own motion, made an order requiring said Comingor and his counsel to appear three days thereafter, and show cause why they should not pay over to said receiver the sum held by them as commission and fees, amounting to $6,766.53, not paid into the state court.

On June 23, 1900, said Comingor filed response

before the referee to said rule, said response is found on page 15 of the record, in the following words and figures, to wit:

> "L. Comingor for response herein to the or-
> "der to pay $3,398.90, says that as shown in
> "his report herein he retained the same on ac-
> "count of his commission as assignee, before
> "any bankruptcy proceedings, relying upon
> "the fact that he would be entitled to more
> "than that sum on final settlement; that for
> "the services rendered the estate herein he
> "believes that this Honorable Court will, on
> "final hearing, allow him at least said
> "amount; that he is a man of no means, has
> "used of said money, from time to time, rely-
> "ing upon its being his, until he has none of
> "it left.
>
> "He says that he is unable to pay said
> "money into court, having neither money nor
> "property of any kind. He says that he has re-
> "cently made efforts to borrow or raise money
> "and finds it impossible to do so. He asks the
> "court for such relief in the premises as the
> "court deems proper."

On the filing of said response the referee held same insufficient, and made the rule absolute, and ordered Comingor to pay to the receiver before June 30, 1900.

On June 28, 1900, said referee, without notice or appearance, made another "show cause" order against Comingor, requiring him to pay June 30,

1900, to the receiver $3,200 paid his counsel, before any bankruptcy proceedings.

On June 30, 1900, said Comingor filed the following response thereto (Record, p. 17), to wit:

"L. Comingor for response to the order herein to show cause why he should not pay the receiver in bankruptcy herein the sum of $3,000 shown in his report as having been paid M. A., D. A. and J. G. Sachs, and $200 to Zach Phelps, Esq., says that said sums were paid them respectively for services rendered him as his counsel whilst acting as assignee before any proceedings herein, as already appears in his report herein. He says further that he has no money or property or means of any kind with which to pay said money or any part thereof, and refers to his former response herein as part hereof. He respectfully submits to the court that he ought not to be compelled to pay said money herein.

"The respondent says further that long before the petition in this proceeding was filed and before he had any knowledge, information or intimation that it was intended to be filed, and relying upon it that he would be permitted to wind up his trust under the deed of assignment for the bankrupts shown in the record in this action or proceeding, he filed and brought his action in the state court as appears in this record, which is still pending and he is still subject to the jurisdiction and orders of said state court requir-

"ing him to settle his accounts there and to "be responsible there for all his acts and do- "ings under said deed of assignment. He sub- "mits to this Honorable Court that this re- "sponse be held sufficient and that the 'show "cause' order herein should be annulled or "suspended until he is relieved from his pres- "ent embarrassing position."

The referee, thereupon, held said response insufficient and made said rule absolute.

Thereupon, on June 30, 1900, said Comingor filed his petition before the referee for review by the district court (see Record, p. 26), and said referee, having filed his report, on the 16th of July, 1900, the court referred the matter back to the referee, with directions to take testimony as to character of services of Comingor and his counsel, and value thereof to the bankrupt estate, etc., and on the 10th day of November, 1900, said Comingor filed an additional response before the referee (see Record, p. 29), which is as follows:

"Leonard Comingor amends his response "herein to the orders to pay $3,398.90 and $3,- "000.00, and for amendment says that as "shown by the pleadings, record and evidence "in this case taken, and the entire proceedings "had herein, neither this court nor the referee "in bankruptcy herein has any jurisdiction "either of this respondent or the matter in- "volved, to make any such orders or require

"respondent to answer thereto, because he "says the records herein show that all trans- "actions with reference to said two (2) sums of "money took place before the petition in bank- "ruptcy was filed herein, and that neither "this court nor the referee in bankruptcy can "proceed against this respondent as herein at- "tempted by order or rule to pay or by sum- "mary process.

"He says the summary proceedings pro- "vided for in the present Bankrupt Act (Sec. "29, Subsec. b), relates to the bankrupt alone "where he conceals from the trustee while a "bankrupt or after his discharge, any prop- "erty belonging to the estate in bankruptcy. "This does not include third parties, but re- "lates to the bankrupt alone, under Subsec- "tion 4 of Section 29 of said Bankruptcy Act, "it is made an offense for any person to receive "any material amount of property from a "bankrupt after the petition in bankruptcy "was filed. Under the present act, except in "cases coming under one of the two (2) above "named subsections, neither the court nor the "referee has the authority (jurisdiction) to "compel the payment of money in the sum- "mary way provided for under Section 41; "that is, by order.

"Where third parties fraudulently with- "hold assets of the bankrupt, obtained before "the filing of the petition in bankruptcy, the "trustee is remanded to his right of action "under Section 23 of the act. Under that "section (23) neither this court nor the referee "has jurisdiction to proceed as herein at-

"tempted by order to pay or by rule or con-
"tempt process to enforce said order. He
"asks that said rule be discharged and said
"orders to pay be set aside and for his costs."

On December 11, 1900, the referee reported said matter back to the district court, and while this matter was pending before the district court, on December 22, 1900, *said additional response* was filed before the court.

On January 19, 1901, the district court filed an opinion on said review, and on January 26, 1901, the following judgment was rendered thereon (Record, p. 40), to wit:

"This case coming on to be heard on the pe-
"tition of Leonard Comingor for review of the
"order of court entered herein by John B.
"Baskin, one of the referees of this court, re-
"quiring Leonard Comingor to pay over to the
"Louisville Trust Company, trustee in bank-
"ruptcy, herein, the sums of $3,398.90 and $3,-
"000.00 and the court being fully advised, de-
"livered a written opinion which was filed
"herein, on January 19, 1901, and in pursu-
"ance of said written opinion, it is considered,
"ordered and decreed by the court that said
"petition for review filed by said Comingor,
"June, 1900, is refused and dismissed, to
"which said Comingor excepts, and it is ad-
"judged and ordered by the court that said
"Comingor pay to said Louisville Trust Com-
"pany, trustee, the said sums of $3,398.90 and

"$3,000.00, on or before February 16, 1901, to "all of which said Comingor excepts."

And then a petition for review was filed in the Circuit Court of Appeals by L. Comingor.

The errors complained of are fully set forth on pages 6, 7 and 8 of the record, and are as follows, to wit:

* * * * *

"Your petitioner further shows that he is "aggrieved by the orders of said district court "and injured thereby and that the errors com- "plained of consist:

"I.

"In said court holding that the referee and "said court had jurisdiction and power to pro- "ceed against petitioner, Leonard Comingor, "in the summary way had, he being a third "party, and not one of the bankrupts.

"II.

"In said court holding that it had jurisdic- "tion and power upon the proceedings, orders "and recommendations of the referee had, to "adjudge said Leonard Comingor in contempt "and to punish him for contempt.

"III.

"In said court holding that the referee had "jurisdiction and power to proceed against "said Leonard Comingor in said summary "manner had.

"IV.

"In said court holding that said Leonard "Comingor held said money for the bankrupts "and could be proceeded against in said sum- "mary manner had.

"V.

"In said court holding that it had the power "and jurisdiction herein to grant or issue the "injunction against Leonard Comingor.

"VI.

"In said court holding that said referee "had the power or jurisdiction to issue said "show cause orders or rules thereon or to pro- "ceed against said Leonard Comingor in the "manner had upon said orders issued.

"VII.

"In said court holding that the filing of said "responses of Leonard Comingor gave said "referee or court jurisdiction or power to pro- "ceed thereon in any manner in said matter, "or in the manner had.

"VIII.

"In said referee and said court adjudging "said responses and each of them insufficient.

"IX.

"In said court finding the facts to be and "adjudging that said sums of money were the

"property of the bankrupts' estate, and that "said Leonard Comingor never claimed title "to any of it nor made any claim of right to "it, or ownership thereof at any time, and "that he had never claimed to have converted "it to his own use, or to have claimed it ad- "versely to the bankrupts or the trustee or the "receiver in bankruptcy.

"X.

"In the court's adjudging that said money "was not converted by Leonard Comingor to "his own use, but held for the benefit of the "trustee.

"XI.

"In the court's adjudging that said Leon- "ard Comingor was properly before the court "in said proceedings.

"XII.

"In the court's failing to dismiss said con- "tempt proceedings against Leonard Comin- "gor and discharging him.

"XIII.

"In the court's finding as a fact and ad- "judging that said Leonard Comingor was a "party to this proceeding in bankruptcy.

"XIV.

"In the court adjudging and ordering said "Leonard Comingor to pay said sums of money "to the receiver (who afterwards became the

"trustee in bankruptcy) in the summary man-
"ner had, after ordering said receiver and
"trustee to make itself a party to the state
"court proceeding which was done, and the
"receiver and trustee became a party to said
"suit in the state court and withdrew all the
"money paid into the state court by said
"Leonard Comingor.

"XV.

"In the court holding that the proceedings
"herein against petitioner, Comingor, are
"equivalent to a plenary proceeding against
"him.

"XVI.

"In the court holding that the acts and pro-
"ceedings herein by or on behalf of the peti-
"tioner, Comingor, amount to or are equiva-
"lent to, or constitute a consent to the juris-
"diction of the referee in bankruptcy or the
"district court herein, in these proceedings
"against petitioner.

"Wherefore, your petitioner prays that the
"orders, judgments and decrees of the district
"court be reviewed and revised in the matters
"of law, and that it be adjudged that said dis-
"trict court was without jurisdiction, and if
"that can not be done, then adjudge that the
"summary proceedings herein were illegal
"and void, or, if that can not be done, then ad-
"judge that his responses were sufficient in
"law and he be discharged. He prays for an
"order of this Honorable Court, directing the
"district court to suspend the execution of its

"judgment of January 26, 1901, and all further proceedings against your petitioner in "this matter until the further order of this "court, and he prays further for all other nec- "essary and proper relief herein."

Upon this review the Circuit Court of Appeals reversed the district court (see opinion and order, pp. 59 and 60, of this record).

"POINTS OF LAW STATED".

For Leonard Comingor it is contended:

1. That the judgment of the Circuit Court of Appeals should be affirmed or this appeal dismissed, because the appellant or petitioner has not brought up the record as required by rules of this court.

2. That the proceedings had herein against said Comingor, were not in the nature of a "*suit*" or "*plenary action*"— but were nothing more than "*summary proceedings*".

3. That neither the referee nor district court had the right or jurisdiction to proceed in the *summary way had*, against said Leonard Comingor; he being an adverse claimant, who had appropriated and converted said money sought to be recovered before the proceedings in bankruptcy were filed, the trustee can proceed against him only by a "*plenary suit*".

4. That neither the referee nor district court had jurisdiction of a *summary proceeding* of the *trustee against an adverse claimant* who had converted the property before the proceedings in bankruptcy were begun, and can not obtain jurisdiction *in such a proceeding* by "*consent of the proposed defendant*".

5. That the acts of Comingor, in said proceedings, in no event, show that he "*consented*" to the jurisdiction of said referee or district court, or the summary proceedings had therein.

6. That the district court erred in holding the three responses, and each of them, insufficient in law, and the Circuit Court of Appeals was correct in reversing that ruling.

7. That the trustee is estopped from proceeding as against Comingor, by reason of the fact of his filing his petition in the suit pending in the state court brought by said Comingor, as assignee, to settle said estate, and on his motion being made party defendant thereto, and in drawing out of said case and accepting the funds, less said commission and counsel fee, in full satisfaction.

"ARGUMENT."

As to the first proposition:

That the judgment of the Circuit Court of Appeals should be affirmed or this appeal dismissed under rule of this court for want of sufficient record.

Rule 8, Subdivision 1, of the court provides:

> "The clerk of the court to which any writ "of error may be directed should make return "of the same by transmitting a true *copy of* "*the record*,' and of the assignment of errors "and all of the proceedings in the case under "his hand and the seal of the court."

Same rule (8), Subdivision 3, provides:

> "No case will be heard until a complete "record, containing in itself, and not 'by refer- "ence, all the papers, exhibits, depositions "and other proceedings, which are necessary "to the hearing in this court, shall be filed.'"

The writ in this case (page 7 of the record) commands the Circuit Court of Appeals for the Sixth Circuit to "send, without delay, to the Supreme Court, *the record* and proceedings in said cause."

The clerk of the Circuit Court of Appeals for the Sixth Circuit does not send up the *record*, and does not certify that what he sends up is the *record*, but he certifies that what he sends up is the *proceedings* in the Circuit Court of Appeals. His certificate is on page 71 of the record, and reads:

> "Pursuant to the command of the within "writ of certiorari, I, Frank O. Loveland, "clerk of the United States Circuit Court of

"Appeals for the Sixth Circuit, do herewith "transmit, under the seal of the said court, a "true, full and complete *copy of the proceed-* "*ings* in the said court, in the cause and mat- "ter in the said writ of certiorari stated."

He does not send the record here that was before the Circuit Court of Appeals, and upon which record their opinion is based, and their judgment rendered, and he is careful to certify that he only sends up the *proceedings* in the Circuit Court of Appeals, and not the *record*.

"It is the duty of the party who takes a writ "of error to see to it that the record is prop- "erly presented here."

Railway Company v. Stewart, 95 U. S. 279.

"Unless the fact upon which a 'reversal of "a judgment' is claimed appears in the record "sufficiently to be passed upon, the judgment "will not be reversed."

New York and Colorado Mining Syndicate & Co. v. Fraser, 130 U. S. 611.

Where the instructions are not in the record the court will presume that they covered defendant's request.

Andrews v. U. S., 162 U. S. 420.
Cohn v. Daley, 174 U. S. 539.

This record, page 1, shows, that on February 14, 1899, a petition in bankruptcy was filed against Simonson, Whiteson & Co., setting up that they had made an assignment to Comingor, and asked for an adjudication in bankruptcy, and prayed a subpoena against said alleged bankrupts and Comingor, and on March 21, 1899, said Comingor moved the court to dismiss as to him, and without waiving his rights tendered an answer. Neither the petition, the motion to dismiss, nor the answer tendered by Comingor, are in this record. All are in the record for review in the Circuit Court of Appeals, and all were considered by the said Circuit Court of Appeals in rendering its opinion and entering the judgment it did herein.

If this court does not affirm this case, then the same should be dismissed.

In Keen v. Littaker, 13 Pet., 459, the circuit court had given a judgment for the defendants on an agreed case, and the record sent here contained only the agreed state of facts, and the judgment of the circuit court, with the petition for the writ of error, and its allowance.

At that time the 11th rule of this court was like the present rule 8, Subdivision 1, and the 31st rule was like the present rule 8, Subdivision 3. In view of these rules and because the record did not contain any of the proceedings in the court below, this court dismissed the case. The same thing was done in the Curtis v. Petitprine, 18 How. 109.

The court below based its opinion on, and had before it the records in the two (2) former hearings of this case. In those records (not here), and of vital importance on this hearing, you find all the pleadings and proceedings. That we are not mistaken that the court below considered other records in rendering its opinion and entering its judgment, now complained of, we refer you, first, to the petition for review, page 2, where they are made a part of the said petition, and, second, to pages 60 and 66, of this record, where the court below rely on the contents of those records for reaching the conclusion that they do, and in reversing the district court. They comment on the original petition filed, and to which it was claimed Comingor was made a party, and the court says (page 66):

> "It is contended, in behalf of the trustee, "that Comingor was made a party to the peti- "tion for adjudication, and having thus been "brought in, he continued to be subject to the "orders of the court, without further or other "process. *But it appears that no special relief "was prayed against him*, etc."

If the court below did not have that original petition (in the first record) before them on the bill of review, how could they dissect it as they do? They also refer to Comingor's motion to dismiss, made soon after the petition was filed, and Comin-

gor's motion to file, and the tender of the answer, all of which forms parts of the records on the former appeals and now on file in the court below, and made part of the record in this case now on trial before you on certiorari.

You will find that the decisions of this court recently rendered in the case of Bardes v. Howarden Bank, Hicka v. Knost, Wall, et al., v. Cox, Trustee, etc., Reed Bryan, Marshal, etc., v. Bernheimer, all bankruptcy cases, bear directly on the case at bar, on the question of jurisdiction of the district court in bankruptcy, and it is necessary to compare pleadings and proceedings to that end. You will further find that you have not the record here to show how the district court undertook to get jurisdiction in case at bar; there is an utter absence of the record prior to the issuing of the "show cause" rules, the issuing of which constitutes the bases of this whole controversy.

You can not compare this case, therefore, with the others named, where you had the whole record, the main question being one of jurisdiction and form of action.

As to second proposition:

That the proceedings had against Comingor were not in the nature of a "*plenary action*" — that is a complete and formal suit—but were simply *summary* proceedings.

In the bankrupt proceedings, Comingor is made a defendant to the original petition, but no relief is sought against him, and no allegation made affecting him, further than the statement of the fact that he is the assignee under the deed of trust made for the benefit of the creditors.

Comingor entered motion asking to have this petition, as against him, dismissed, and, without waiving this motion, tendered an answer, but the motion was never acted on, nor was the answer ever filed, but both motions are still pending undetermined.

This petition made no claim against Comingor for this money—*the commissions and counsel fees* —and did not seek to recover *any money* from him. After said motion to dismiss was entered, in the subsequent proceedings had, Comingor was entirely ignored, and no action was ever taken against him on said petition. The pleadings on the original petition, as against Comingor, were never completed, no issue was tendered or any allegation made that would have been sufficient to sustain a judgment by confession or to have authorized any order against Comingor.

If these pleadings had been *completed*, or if the motion to file Comingor's answer had been acted on, and the court had refused to permit it to be filed—*then*, if the *allegations of the petitions had been sufficient*, —there might be some grounds for the claim that the proceedings had against Comin-

gor were, *in form* a plenary action, but with a motion to dismiss and an answer already tendered, and not acted upon, the conclusion is irresistible *that the trustee abandoned this action under the petition*, and resorted solely to the *summary method had before the referee.*

On September 20, 1899, a *final judgment* was rendered on this original petition in bankruptcy, and said judgment was affirmed by the Circuit Court of Appeals, and on the 17th day of May, 1900, the mandate of the Circuit Court of Appeals was filed. In said judgment, Comingor's name is not mentioned, and no order is made as against him or right enforced.

The "show cause" orders, the basis of the entire proceedings herein against Comingor, originated before the referee, and they had no connection with the petition; and it will not be contended that a *plenary action* can originate before a referee, therefore, the proceedings had herein were *necessarily summary.*

There were no parties—no one interested filed any basis for rules or asked the referee to issue them—probably they did not want it done.

Comingor had the right to believe that the creditors were satisfied with his management of the trust under the common law assignment to him and the expenses incurred, including his commissions and attorney's fees, because the assignment was made December 5, 1898, and he was

settling his accounts in a suit for that purpose in the state court, and the matter was in the hands of the master commissioner, the money in the state court and ready for distribution among creditors, when, for the first time, in June, 1900. more than a year and one-half after the assignment, the referee in bankruptcy, on his own motion, and not at the instance of the creditors or any one of them, or any party or privy, and without notice or appearance appointed the receiver and entered the show cause orders to pay back his commissions that he had spent in the meantime, and the fees paid his counsel, without right, jurisdiction, or any basis for any such orders.

It never was intended by Congress that the referee should ever be permitted to make orders t tosummarily turn over money or property, because he is directly interested. He receives one per cent on the amount distributed. (Sec. 40 of the Act of 1898.) To the extent of his commissions, he is a party in interest. Hence, if such procedure be permitted, you have a party in interest making orders and sitting in judgment in his own case.

As to the third proposition:

That neither the referee nor district court had the right or jurisdiction to proceed in the *summary way* had, against said Comingor.

The referee had no authority to issue the rules.

The jurisdictional facts do not appear that would have authorized him to act for the district court as required by Section 38, Subdivision 3.

There is no authority given to the referee under the Act of 1898 to issue such rules. Loveland's Law and Proceedings in Bankruptcy, page 95. He had no authority to apoint the receiver to whom Comingor was directed to pay the money, and had no authority to enter an order directing the collection of the money, and still less authority, if such were possible, to collect by contempt process.

The referee had no power to appoint the receiver, especially without any application of any party in interest and could make no order directing persons to turn over money or property to such illegally appointed receiver. The power is vested exclusively in *courts of bankruptcy* Section 2, Subsection 3, and *courts of bankruptcy*, are defined in Section 1, Subsection 8, and referees are not included.

No receiver can be appointed at all unless on application of parties in interest. Section 2, Subsection 3.

The jurisdiction is exclusive in the bankruptcy courts under Section 2, Subsection 7, to cause the estates of bankruptcy to be collected, distributed and determine controversies in relation thereto, except as in the act otherwise provided. The exception is Section 38, Subsection 3, which

provides that the referee may exercise the power of the judge in taking possession of the property of the bankrupt in the event of the issuance by the clerk of a certificate showing the absence of the judge from the district, or his sickness or inability to act.

Section 69, which also provides for provisional seizure of property before election of trustee, vests the power in the judge to direct the seizure by the marshal, and Section 1, Subsection 16, defines the "judge" to be the judge of the court of bankruptcy, and expressly excludes the referee.

It will thus be noticed, first, that under no circumstances can the referee appoint a receiver or cause the estate of the bankrupt to be collected by summary remedy, except in the absence or inability of the judge, evidenced by the certificate of the clerk provided for in Section 38, Subsection 3. Second, that neither courts of bankruptcy nor referee, acting for the courts, as provided in Section 38, Subsection 3, can appoint receivers or marshals to take charge of property of bankrupts, except upon application of parties in interest. Section 2, Subsection 3.

Comingor had appropriated and converted this money before any proceedings in bankruptcy were filed; at the time he so appropriated said funds he had the lawful authority and right to do so; the deed of assignment was then a valid instrument and in full force and effect, and he, in

said act, was legally settling said trust created thereunder. He was an adverse claimant as against said receiver, who afterward became trustee, and both his right to and possession of said fund were complete before the proceedings in bankruptcy were instituted; and to maintain an action against him, the trustee must resort to a *plenary suit*, in the court having jurisdiction thereof, as provided in Section 23 of the Bankrupt Act of 1898.

In Bardes v. Hawarden Bank, 178 U. S. 538 (1180), it is said:

> "It was also repeatedly held by this court "that the right of an assignee in bankruptcy "to assert a title in property transferred by "the bankrupt before the bankruptcy, to a "third person, who now claims it adversely to "the assignee, could only be enforced by a "plenary suit at law, or in equity, under the "second section of the Act of 1867, and not "by summary proceedings, under the first sec- "tion thereof, notwithstanding the declara- "tion in that section, that the jurisdiction in "bankruptcy should extend 'to the collection "of all the assets of the bankrupt,' and 'to all "acts, matters and things to be done under "and in virtue of the bankruptcy' until the close of the proceedings in bankruptcy." Smith v. Mason, 14 Wallace, 419, 20 L. Ed., 748; Marshall v. Knox, 16 Wallace, 551, 21 L. Ed., 481; Eyster v. Gaff, 91 U. S. 521, 23 L. Ed., 403.

* * * * * *

"On the contrary, Congress, by the second "clause of Section 23 of the present Bank- "ruptcy Act, appears to this court to have "clearly manifested its intention that con- "troversies, not strictly or properly part of "the proceedings in bankruptcy, but inde- "pendent suits brought by the trustee in "bankruptcy, to assert a title to money or "property as assets of the bankrupt against "strangers to those proceedings, should not "come within the jurisdiction of the District "Courts of the United States, unless by con- "sent of the proposed defendant."

* * * * * *

"The District Court of the United States "can, by the proposed defendant's consent, "but not otherwise, entertain jurisdiction "over '*suits*' brought by the trustee in bank- "ruptcy to set aside fraudulent transfers of "money or property, made by the bankrupt "to third parties before the institution of the "proceedings in bankruptcy."

In April, 1901, this court decided, Wall et al. v. W. O. Cox, Trustee, etc. (see ad. sheets June 1, 1901), reaffirming the rule in the Bardes case, and deciding that the District Court of the United States had no jurisdiction of a bill seeking to recover property from parties claiming under adverse title obtained just *before the petition* in bankruptcy was filed, the basis of the latter petition being the transaction under which they got

title, that the trustee in bankruptcy, must proceed in the proper jurisdiction by plenary proceeding.

About the same time (see ad. sheets, May 15, 1901, p. 557), this court decided the case of Bryan v Bernheimer, holding that third parties obtaining title to property of the bankrupt *after* petition filed from the assignee of the bankrupt, took with notice and from the agent of the bankrupt, who was not an adverse claimant, and must deliver to the marshal who was directed to take possession under Clause 3 of Section 2, and Section 69 of the Bankruptcy Statutes. Attention is called by the court to the fact that in the Bardes case the trustee had been appointed whilst in this case he had not; and moreover the claimant Bernheimer had submitted the matter to the court, and Davidson (the assignee), who sold to Bernheimer after bankruptcy petition was filed, did not hold under any claim of right in himself, but held only under the general assignment.

The distinguishing features of this case are summed up by the court thus, viz.: Considering the property was not held by Davidson under any claim of right in himself, but under a general assignment, which was itself an act of bankruptcy; that no trustee had been appointed, that the sale by Davidson to Bernheimer was made *after and with knowledge of the petition in bankruptcy*, and that Bernheimer consented to the form of

proceedings, we are of the opinion that Bernheimer had no title superior to the title of the bankrupt estate.

The case at bar bears no similarity to the one last cited, but belongs to the class referred to in the Bardes case. In our case the assignee for over two (2) months had an action pending in the state court to settle his trust; had sold all the property under orders of the state court, paid out large sums of money for expenses, including his counsel and commissions to himself, and had paid the balance or nearly all into the state court *before any petition in bankruptcy was filed;* and the trustee in bankruptcy afterward became voluntarily under order of the bankruptcy court a party to the state court proceedings to obtain, and he did obtain, all the funds save a small balance left in the assignee's hands, which he turned over to the trustee. Thus the two sums of money now sought in this proceeding, viz.: the assignee's commissions and the fees paid his counsel, were no part of the bankrupt estate when the petition in bankruptcy was filed. The assignee had appropriated the commissions, paid the fees which is admitted the state court would have allowed, and paid out the same just as he had paid other expenses of his trust—all before any petition in bankruptcy. Money has no earmarks, and if the assignee had wrongfully appropriated too much or paid out more for fees to counsel or expenses,

and did not pay into the state court all that he should whilst acting under its orders and before he had any reason to suppose he would be stopped by proceedings in bankruptcy, the trustee having made himself party to the state court settlement suit could have obtained what he was entitled to. To say the least of it, at the time the petition in bankruptcy was filed, Comingor was holding no part of the money sought to be coerced from him in this proceeding, as assignee, or agent for the bankrupts for the purpose of distributing among their creditors. There was no property or specific fund of money in his possession belonging to the bankrupt's estate at the time the petition was filed—at most, there was a right in the creditors and the bankrupts to make him account in the state court settlement suit, which right was acquired by the trustee in bankruptcy afterwards, and which he could enforce by plenary proceedings as provided by the law that gave him his office (23 B. Bankruptcy Law), or in the state court where he made himself a party and started to act, or as said by Thompson, District Judge, in Stevens v. Flick, 2 N. B. N. & R. 1046, "at the time the petition in bankruptcy was filed the moneys were not on hand and the title thereto could not vest in the trustee in bankruptcy, but it is a serious question whether a right of action did not vest in the trustee against the assignee for the wrongful conversion of these moneys."

Under such circumstances Comingor was holding adversely to the trustee in bankruptcy, adversely to the bankrupt under whom the trustee claimed, under title acquired before any bankruptcy proceedings, and all were parties to the state court suit involving a settlement of any differences, and the district court was in error in sustaining the summary contempt proceedings, especially after directing the trustee to appear in the state court in the action involving the settlement of the account of Comingor as assignee.

In Mueller, Trustee, v. W. T. Nugent, decided by the Circuit Court of Appeals for the Sixth Circuit, January 8, 1901, it is said:

> "The person in possession of the fund be-
> "fore the petition in bankruptcy was filed,
> "could not be dispossessed by violence, or
> "otherwise, than by a '*plenary suit*,' where
> "his right to retain it could be tried and de-
> "termined."
>
> * * * * * *
>
> "In the case of a general assignment for
> "the benefit of creditors, the assignment be-
> "ing void, the assignee's possession is without
> "right and the title as well as the right to
> "possession is in the assignee (trustee). But if
> "the latter can not recover the property
> "otherwise than by legal proceedings, he must
> "resort to the *ordinary legal remedies*."
>
> * * * * * *

"The fiduciary relation between them gives "the principal no extraordinary remedy to "compel the agent to deliver the property, "which he holds, to his master. That rela- "tion may affect the determination of the "court, when its jurisdiction has been prop- "erly invoked, but that is another matter. "The case with which we have to deal is one "where the bankrupt transfers the assets be- "fore the petition in bankruptcy is filed, and "the trustee has never had possession, and "where his right is given by the retroactive "operation of the law, resulting from the ad- "judication in bankruptcy."

It is earnestly insisted for Comingor, that he was not a proper or necessary party to said bankrupt proceedings, but if this contention is not correct, it is certainly true that the controversy between the trustee and Comingor, as to the funds now in question, which were appropriated and converted by said Comingor, before the proceedings in bankruptcy were instituted, and which he holds adversely to said trustee—is not strictly or properly part of the proceedings in bankruptcy, and, in no event, can the district court acquire jurisdiction of such a controversy, simply because Comingor has been, without his consent, made a party to said original petition in bankruptcy. To so hold would be in direct conflict with the twenty-third section of the present Bankrupt Act.

> "By the remedy pursued he (Comingore) was deprived of his right to a trial by jury." (Circuit Court of Appeals, opinion p. 67 of this record.)

The power of courts to order a reference in an action at law, without consent of the parties, is not derived from the common law, but is dependent wholly upon statute. And hence the Federal courts have no power to order a reference without consent, since there is nothing in the Constitution or laws of the United States granting such a power; and since, moreover, compulsory reference in cases involving more than twenty dollars would be in direct violation of the seventh amendment to the Constitution of the United States, providing that, "in suits at common law, where the value in controversy shall exceed twenty dollars, *the right of trial by jury shall be preserved.*"

> U. S. v. Rathborne, 2 Paine (U. S.), 578.
> Howe Machine Co. v. Edwards, 15 Blatchford (U. S.), 462.

In U. S. v. Rathborne, 2 Paine (U. S.), 578, the court, by Judge Thompson, said:

> "The convenience and utility of adopting "this mode of trial by referees, where the "controversy involves the examination of "long accounts, have led me to look at the

"question with a wish to find the practice "sanctioned by the Constitution and laws of "the United States, but I have not been able "to find any ground upon which such author- "ity can be sustained."

We quote from the opinion of the Circuit Court of Appeals in this case (Record, p. 67):

"But it may well be doubted whether such "a proceeding is due process of law in such "circumstances. Comingor had been ousted "of his trust, and the question was that of his "obligation to pay certain moneys alleged to "be in his hands belonging to the trustee. "By the remedy pursued he was deprived of "his right *to a trial by jury*. The determina- "tion of the referee upon the facts would not "be subject to appeal or writ of error. The "judgment would not be enforced by execu- "tion, but by process for contempt. The pro- "ceeding, when employed for such a purpose, "is in the nature of a civil remedy for the re- "covery of money."

The proceeding by contempt process in this case seeks to enforce the payment of *two specific sums of money* alleged to be held by Comingor *without right*. No equitable action could be brought for the same. The proceeding to recover must be at *common law*, with the right of Comingor to a "trial by jury."

As to the fourth proposition:

That neither the referee nor district court can obtain jurisdiction, in a summary proceeding, by the trustee against an adverse claimant, who obtained the property before the proceedings in bankruptcy were instituted—*by consent* of the proposed defendant.

By the authorities cited, under the "second proposition," it is clearly shown that such a claimant can be proceeded against only by "*plenary suit*" and in Bardes against the Hawarden Bank, it is held that the district court may obtain jurisdiction of *such a "suit"—by consent.*

As a general proposition, free from statutory enactment, a court can never obtain jurisdiction *by consent*, and it is only by reason of Subsection "b," of Section 23 of the present Bankrupt Act, that district courts can obtain jurisdiction of such suits *by consent*, and this section expressly limits the obtention of jurisdiction by consent to "*suits*" that is, ordinary legal remedies at law, or in equity, and not to summary proceedings, that are available only as part of the bankrupt proceedings.

In the case of In re Steuer, 104 Federal Reporter, it is said:

> "The defendant further objects that this "court has no jurisdiction to set aside a pre- "ference, even by the defendant's consent, un- "less the proceedings are by way of *plenary* "*suit.*"

And in this case, which is by petition, after making the quotations from the case of Bardes v. Hawarden Bank, made also in this brief, the court concedes that the *objection* is sustained by the Bardes case, but says:

> "Even with the defendant's consent to the "general jurisdiction of the court, the court "must, if the defendant insists, proceed by "plenary suit. But Stickney v. Wilt, 23 Wal- "lace, 150, and Milner v. Meek, 95 U. S. 252, "and, perhaps, White v. Ewing, 159 U. S. 36, "must still be taken to authorize a proceed- "ing by way of petition, where the court has "jurisdiction to proceed by plenary suit, "where no seasonable objection is taken to "the form of the procedures, and where, under "the form of a petition in bankruptcy the "rights of respondent are secured as substan- "tially as in a plenary suit."
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> • • • • • •
>
> "In order that proceedings to recover prop- "erty may be validly commenced by petition "in bankruptcy, the petition must, as sug- "gested in Milner v. Meek, 95 U. S. 252, con- "tain a complete statement of the cause of "action, and a sufficient prayer for relief."

As shown, in the case at bar, the petition in bankruptcy did not set up a cause of action against Comingor, and did not pray for any relief against him. The motion to dismiss as to Comin-

gor, and the tender of answer, are still pending—the proceedings, by way of this petition, were abandoned, and the show cause orders can not relate back to this petition as a basis for their issual, and no petition was filed with the referee on which they could be issued, conceding that a petition could be filed before the referee as such foundation.

The rights of Comingor under these proceedings had, were not secured as substantially as in a plenary suit. This proceeding in effect begins with a finding against him in the nature of a judgment, and requires him to show cause why he shall not pay it. It is thought this case of In re Steuer goes even too far, in holding that a proceeding on a petition in bankruptcy is authorized, *unless objected to*, but in the case at bar no petition exists to sustain said summary proceedings.

Consent will not avail to give jurisdiction where the law provides the way in which the jurisdiction is to be invoked, and that way has not been complied with. Encyclopedia of Pleading and Practice, Vol. 12, page 120.

If Comingor had consented to the jurisdiction the procedure must be in the way pointed out by the "law of the land."

Though there be a consent to the jurisdiction, that jurisdiction can not be invoked in a proceeding commenced by contempt process. It must be a plenary suit.

He may consent to the forum, but no consent of his can change the mode of procedure.

In the language of Justice Field, in Windsor v. McVeigh, 93 U. S. 282:

> "Though the court may possess jurisdiction "of the subject matter and of the parties, it "is still limited in its modes of procedure and "in the extent and character of its judgments. "If, for instance, the action be upon a money "demand, the court, notwithstanding its com- "plete jurisdiction over the subject and the "parties, has no power to pass judgment of "imprisonment in the penitentiary upon the "defendant. If the action be for libel or per- "sonal tort the court can not order in the case "a specific performance of a contract. If the "action for the possession of real property, "the court can not admit in the case the pro- "bate of a will. The judgments given in the "cases mentioned would not only be erro- "neous, but void, because, the court, in ren- "dering them, would transcend the limits of "its authority in those cases."

Or, as the circuit court in its opinion in this case says, "the question of remedies is involved in that of jurisdiction." And further that the case of Marshall v. Knox, 16 Wal. 551, "shows that the question involved is one of jurisdiction, and that the party complaining of its exercise is not precluded from his objection by having contested a rule to show cause made by the bankruptcy court."

(See opp. of circuit court, pp. 67 and 68 of this record.)

As to the fifth proposition:

"That the acts of Comingor, in no event show that he consented to the jurisdiction or proceedings had."

1st. His first appearance in said proceeding is by a motion to dismiss said petition against him. This is an express refusal to consent. (Petition for review. Record, p. 1.)

2d. He next appeared before the referee, as required by rules, and filed a statement with him, taking credit therein to himself by the *commission and counsel fees*, now herein sought to be recovered. (Record, pp. 8 and 9; Exhibits 1 and 2.)

3d. He again appeared, by filing response, as required by rule or show cause order, to pay to the trustee $3,398.90, his commissions retained. In said response he says he is unable to pay, and he believes that the honorable court, on final hearing, will allow him, at least, said amount; and, finally, "he asks the court for such relief in the premises as the court deems proper." (Record, p. 15; Exhibit No. 7.)

4th. He again appears, by response, to "show cause order," requiring him to pay the trustee $3,000, the counsel fees paid out by him in administering said trust. In this response he says he is

unable to pay. That before the proceedings in bankruptcy were instituted, he filed a petition in the state court to settle this trust, and is now subject to the orders of said court, and he asks that this show cause order be annulled. (Record, p. 17; Exhibit No. 10.)

5th. He, finally, appears by filing an additional response, first, before the referee, then the court—in which he enters a special plea to jurisdiction of the court to proceed against him in the manner had. (Record, pp. 29 and 30; Exhibit No. 17.)

It is thus shown that every time Comingor appeared in said proceedings he was expressly objecting to the jurisdiction, except, perhaps, the third time he appeared; this was when he filed his first response, and in that, he, after stating that he was unable to pay, says, "he believes that the "honorable court, on final settlement, will allow "him, at least, said amount."

And at the conclusion of said response he says, "he asks the court for such relief in the premises "as the court deems proper."

Section 23 of the present Bankrupt Act does not give the district court jurisdiction of "*suits*" against adverse claimants, subject to be defeated by the seasonable objections thereto by the defendant, but to obtain such jurisdiction, the *consent* of the proposed defendant must be obtained, and such *consent* implies his free, deliberate and voluntary action, not a mere yielding by

him to what appears to be inevitable, such as a response to a coercive process, as in the case at bar.

But, it is submitted that the language used does not constitute a *consent* and when the entire actions of petitioner, in said proceedings, are considered as a whole, it is obvious that he did not consent to said jurisdiction; he emphasizes this by his motion to dismiss, which is still pending.

But, in the event that the court determines that petitioner did consent to the jurisdiction, that is sufficient, in case the proceedings are by way of a *plenary suit* — and, if it is by a petition in bankruptcy, *in which a cause of action is stated, and necessary prayer for relief made*, it may be still good, unless defendant objects to the form of the proceedings. But, in a proceeding like the one had in the case at bar, no consent of the defendant can give jurisdiction.

As to the sixth proposition:

The first and second responses filed show, that before the institution of the proceedings in bankruptcy, and while the deed of assignment was still a valid instrument, Comingor, in the settlement of said trust, paid the counsel fees and appropriated his own salary, and that he now has no money or property, and can not pay same back; these responses both show that Comingor had no criminal intent in what he did, and, further, that,

at the time he paid and appropriated said money, he had the right to do so; the deed to him was not void *ab initio*—but was only voidable, and, if the proceedings in bankruptcy had not been filed within four months thereafter, said deed could not have been set aside or held void. He alleges his inability to pay, and, unless this is proven not to be true, is a complete defense. But, upon the filing of these responses, without evidence or a hearing thereon, said referee at once holds them insufficient.

Comingor, between the time this trust under the deed of assignment was accepted by him, and the institution of the proceedings in bankruptcy, had paid out cash some $19,000, in administering said estate; can it be insisted that he can be compelled to pay this to this trustee? If not these, why single out the *commissions and counsel fees*, that came within the same class? The court did not find that Comingor had this money in his hands or could pay.

In pointing out the difference between the Acts of 1867 and 1898, Loveland, in his work on Bankruptcy, page 15, says:

> "Under the Act of 1867 the title to the bankruptcy property vested in the assignee (in bankruptcy) under conveyance, as of the date of the filing of the petition in bankruptcy; while, under the Act of 1898, it vests by operation of law in the trustee, as of the

adjudication. If the judgment is appealed, then the adjudication dates from the time that the judgment is confirmed, Section 1, Subdivision 2, Bankrupt Act, 1898."

The adjudication in this case was the day of April, 1900.

The common law deed of assignment was dated and executed December 5, 1898, so that the title vested in Comingor, December 5, 1898, and remained in him until the adjudication, April , 1900, undisturbed. He was bound, under his bond to the creditors, to execute his trust. In the meantime this litigation was going on between the bankrupts and some of their creditors, and Comingor did not know that there would ever be an adjudication. Had Comingor done nothing by way of executing the trust, laid dormant from December, 1898, to April, 1900, to see what the district court in bankruptcy was going to do, and the district court had refused to adjudicate them bankrupts, Comingor would have been liable on his bond to the creditors for over $90,000—realized by him—which is a fair value of the property vested in him by the deed of assignment. Besides his liability on his bond, and his oath to faithfully execute his trust, he was forced to believe that even the district court was satisfied with his management of the trust, because, soon after the petition was filed, the petitioning cred-

itors moved the judge of the district court to appoint a receiver, but the judge, upon a full hearing by all parties, and by counsel, refused to appoint a receiver, and left Comingor to continue to wind up his trust in the state court under the supervision of the chancellor, and no receiver was appointed until June 20, 1900. And that appointment was made by the referee on his own motion, and not upon the application of any one, and without notice, appearance or a hearing.

When the contempt results from a failure to obey an order of the court, the showing that such failure is due to an actual inability to comply with the order is a sufficient answer and purges the contempt.

7 Am. and Eng. Ency. of Law, page 72.
In re Hyman, 97 Federal Reporter, 195.
In re Purvine, 96 Federal Reporter, 192.
In re McCormick, 97 Federal Reporter, 566.
In re Mayer, 98 Federal Reporter, 839.
Brown v. Brown, 96 Kentucky, 505.
Walton v. Walton, 35 Atlantic Reporter, 289.
Kane v. Haywood, 66 N. C. I.
Adams v. Haskall, 6 Cal. 316.

And this was also held by the Circuit Court of Appeals in this case. (Record, p. 69.)

But it is contended for petitioner that *insolvency or inability to pay* is not a legal response to a rule to pay.

In this case respondent was, by the referee, ruled to pay, he, respondent, among other things, his insolvency and inability to pay. The referee held this response insufficient. He, thereupon, filed a bill of review, and the court rendered an opinion thereon, sustaining the referee, and refusing to allow any amount whatever to respondent or his counsel, and rendered judgment, based on said opinion, dismissing said bill of review and ordering respondent to pay said money by a day named. This was a summary proceeding that could form a basis only for a contempt proceeding, and in the opinion of the Circuit Court of Appeals, pages 69 and 70, in considering this matter, it was said:

> "The referee was of the opinion that the respondent was not entitled to any compensation whatever, and that he had no legal right to pay fees to his counsel without an allowance therefor by the state court, and that, therefore, he 'must be deemed to have the funds in his possession.' The court ordered a reference for a further report in regard to the question whether the respondent was entitled to any compensation for his services as assignee, and whether the counsel were entitled to any. But no question was referred touching the fact that the respondent had retained and spent the money he claimed to be due him for his compensation, or the fact that he had paid the sum mentioned to

his counsel, or the ability of the respondent to refund the moneys. The confirmation by the court affirmed the insufficiency of these facts to excuse the respondent from paying over the money, and the court, thereupon, ordered him to pay it before a day named. With these adjudications behind him there was nothing to follow but imprisonment, from which there could be no prospect of relief, but by reiteration of the same facts which would be unavailing. But it is well settled that a showing made by a respondent that he is unable to do an act required of him upon an order to show cause is a sufficient answer. It matters not for the purpose of such a proceeding that the inability to do the thing required may be in consequence of his own fault arising from a mere misconception of his rights, or, committed before the court, took jurisdiction of the matter; the court can not compel an impossibility. Hendryx v. Fitzpatrick, 19 Fed. 810, 814, per Lowell and Nelson, judges; In re Chiles, 22 Wal. 157, 168; Loveland on Bankruptcy, Sec. 239; Kane v. Haywood, 66 N. Car. 1.

"Other remedies may exist for punishing the petitioner, if there is ground for it, or for establishing a civil liability if the necessary facts exist.

"The result is that the orders of the referee adjudging the responses of the petitioner insufficient, and the order of the court confirming the same, must be set aside."

In the brief for petitioner, page 14, it is said:

> "If this case is affirmed and the petition for a review denied, Comingor will still have an opportunity to recover the $3,000 from Messrs. Sachs, or else to show his inability to obtain it. And if he convinces the court that he has really spent the $3,398.90, and is unable to pay it, and further convinces the court that his counsel will not return, and can not be compelled to return the $3,000, surely the court will not punish him for his failure to do an impossibility; but, as above explained, the question of punishment has never arisen in the lower court, and I apprehend will not be determined on the petition for review until it has been first decided there."

Respondent has no right of action against his attorneys for the money paid them, and if any such right existed, it is now certainly vested alone in the trustee.

Respondent's answer of his insolvency and inability to pay was certainly a good response to the rule to pay, and it was not necessary that he be taken into custody for contempt before he could file and rely on same to stop further proceedings of said rule, and when it is held by the court insufficient and he ordered to pay by a day named, it is believed to be such a final order as will be considered on review, as he has already answered that he can not pay, and it must be

taken that further failure to comply with said order by reason of said insolvency, would necessarily mean punishment to him, as that would be the natural result of such proceedings, and it must be held that same was intended. If he must wait until the specific punishment is adjudged, then he must suffer, perhaps wrongfully, before he can obtain relief, and this the law never contemplated. The holding of his answer insufficient and the judgment to pay, notwithstanding same, is a final order and decision upon his rights.

The fixing of the extent of the punishment for said contempt relates more to the execution of the judgment than the rights of the respondent which has already been determined. As shown by the transcript (record, p. 58), when this bill of review reached the Circuit Court of Appeals, in order to sustain a suspension of the infliction of the punishment for contempt, respondent again filed his same defense therein as pleaded in the court below, and is as follows:

> "On our motion to stay the execution of the judgment in the district court, and hear the review, without bond, we filed the affidavit of the petitioner, Leonard Comingor, to conform with the decision of the Supreme Court of the United States in the case of Davis against Speiden, 104 U. S., page 83.
>
> The affidavit reads as follows (record, p. 58):

No. 943.

UNITED STATES CIRCUIT COURT OF APPEALS.

Sixth Circuit.

SINSHEIMER, LEVINSON & COMPANY v. SIMONSON, WHITESON & COMPANY.	In the matter of the petition of Leonard Comingor to review an order of the District Court of the United States for the District of Ky.

"The petitioner and affiant, Leonard Comingor, says, on oath, that his insolvency, shown in his responses, on pages 18 and 21 of this record, still exists, and he says that he is utterly unable to comply with the judgment of the district court, requiring him to pay to the Louisville Trust Company, trustee herein, the sums of $3,398.90 and $3,000, or either of said sums, or any part thereof. He says he has no means and no possible way, by or from which, he could raise the money to pay to said trustee or bring it into court, and all of this because of the great financial embarrassment under which he is now laboring. He says he is unable on account of his poverty, want of assets and financial embarrassment aforesaid, to give security for the money or execute any bond for a stay of these proceedings

against him, or to execute a supersedeas bond herein.

"Leonard Comingor.

"State of Kentucky, County of Jefferson:

"I, Edward C. Mumphrie, a notary public in and for the county and state aforesaid, do hereby certify that on this day the foregoing affidavit was subscribed and sworn to before me by Leonard Comingor. My notarial commission expires at the expiration of the next Senate of Kentucky.

"In testimony whereof, witness my signature and official seal, this 14th day of February, 1901.

(Seal.) "Edward C. Mumphrie,

"Notary Public in and for Jefferson County, State of Kentucky."

And the Circuit Court of Appeals granted the stay order. (Record, p. 57.)

By Section 990 of the Revised Statutes of the United States, it is provided:

"No person shall be imprisoned for debt in any state on process issuing from a court of the United States, where, by the laws of such state, imprisonment for debt has been or shall be abolished. And all modifications, conditions and restrictions upon punishment for debt, provided by the laws of any state, shall be applicable to the process issuing from the courts of the United States to be executed

> therein; and the same course of proceedings shall be adopted therein as may be adopted in the courts of said state."

By the 18th Section of the present Constitution of Kentucky, it is provided:

> "The person of a debtor, where there is not strong presumption of fraud, shall not be continued in prison after delivering up his estate for the benefit of his creditors in such manner as shall be prescribed by law."

As to the seventh proposition:

That the trustee is estopped from proceeding herein, by reason of the filing of his petition in the state court and being made a party defendant to those proceedings, and bound by his conduct there and the judgment there rendered.

At the same time that the bankruptcy court entered the show cause orders against Comingor seeking to enforce by contempt process the payment of the funds in the adverse possession of Comingor in part and expended by him in part, before any proceedings in bankruptcy, the trustee in bankruptcy appeared in the state circuit court in the action there pending, which is referred to in Comingor's response, being brought for the purpose of settling his accounts as assignee under deed of assignment, and for distribution among creditors.

Having been directed by the state circuit court to file his petition as required by Section 29 of the Code of Practice for Kentucky, the trustee in bankruptcy filed his petition accordingly. The section of the Code of Practice referred to reads as follows, viz.:

> "Section 29. In an action or proceeding for "the recovery of real or personal property, or "for the subjection thereof to a demand of the "plaintiff under an attachment or other lien, "any person claiming a right to, or interest in, "the property or its proceeds, may, before "payment of the proceeds to the plaintiff, file, "in the action, his verified petition, stating his "claim and controverting that of the plain- "tiff; whereupon the court may order him to "be made a defendant; and upon that being "done, his petition shall be treated as his an- "swer. But if he be a nonresident, he must "give security for costs."

The trustee in bankruptcy, in his claimants' petition under said Section 29, stated to the state court, among other things, that

> "the officers of this court (state circuit court), "the clerk, sheriff and commissioner, have "been paid all their fees and have no claims "upon the fund herein, and that the fund in "court herein, viz., the sum of $46,305.03, be- "longs to the creditors of said bankrupt firm, "and that nobody else has any interest there-

"in, neither officers, attorneys nor anybody "else, and that under said proceedings the "title to said fund has passed to your peti- "tioner, as the trustee in bankruptcy, for the "benefit of all of the creditors of said bank- "rupts.

"Wherefore, your petitioner prays the court "that this its petition be filed, and further "prays the court to order and direct that the "plaintiff make your petitioner a defendant "herein, and that your petitioner's pleadings "and petition be taken as its answer and peti- "tion herein to the fund in court; and further "prays the court to order and direct the re- "ceiver of this court to pay to your petitioner, "as trustee in bankruptcy in said proceedings "in bankruptcy, under and by virtue of the "proceedings, appointment order and qualifi- "cation, the said sum of $46,305.03, and fur- "ther respectfully apply to the court for all "further and proper relief."

Based upon this petition of the trustee in bankruptcy, the state circuit court entered an order, in which it appears as follows, viz.:

"And thereupon said petitioner, by Augus- "tus E. Willson, attorney, moved the court "that said petitioner, the Louisville Trust "Co., trustee in bankruptcy of said bankrupts, "Simonson, Whiteson & Co., D. G. Simonson, "I. Whiteson and Leo Stern, be made party "defendants to this action; and thereupon "said trustee moved the court that said peti-

> "tion be taken as the answer and petition of
> "the said Louisville Trust Company, as such
> "trustee, claiming the fund in court herein,
> "which is so ordered by the court."

The court then proceeds to give the trustee in bankruptcy leave to withdraw the fund in court.

We respectfully urge that by this conduct, the bankrupt trustee abandoned the summary proceedings then pending in the bankruptcy court. He became party to the state court action involving a settlement of Comingor's accounts as assignee under the deed of assignment, seeking to obtain the bankrupt's assets from adverse claimants.

He took the proper course when he went into the state court, as appears from the decision in Bardes v. First National Bank of Hawarden, in construing Section 23 of the Bankrupt Act of 1898.

In the case cited, this court decides that the District Court of the United States can not entertain jurisdiction over suits brought by trustees in bankruptcy to recover money or property from third parties, paid or conveyed to them before the institution of the proceedings in bankruptcy. As is stated in the opinion:

> "One object in inserting this clause in the
> "act may well have been to leave such con-
> "troversies to be tried and determined for the

"most part in the local courts of the state, to "the greater economy and convenience of liti- "gants and witnesses." (Sec. 1006. Vol. 20, Sup. Ct. Reporter.)

When the trustee took the proper course, by going into the state court, he said to that court, in his pleadings, and stated as a basis upon which to grant him the relief prayed, that Comingor, his counsel in the state court, and all of the state court officers interested in the fund in court, were paid. He could not otherwise have obtained the granting of his prayer for the fund in that court. The state circuit court was a court of competent jurisdiction, the trustee and Comingor were parties, and the trustee formally states of record that Comingor and his counsel, and every one but the creditors, have been paid, in order to get the fund remaining in court, and then turned about in the bankruptcy court to resume the coercing, by summary process, of the paying back of the money that was ascertained in the state court by his admission to have been properly paid to Comingor and his counsel. The trustee in bankruptcy received the whole balance of the money in court, under a judgment or order of court, ascertaining practically that it was in full settlement of Comingor's account with creditors, and the trustee still holds the fund.

Having obtained the aid of an injunction from

the bankruptcy court, preventing Comingor from interfering with his getting the fund in the state court, the trustee in bankruptcy is doubly estopped from his wrongful attempt in this proceeding.

It would be useless to refer the trial of such issues to the local courts of the state if, after the local court has rendered its judgment and the plaintiff has obtained the relief he prayed, he can turn about in the Federal courts and ask relief under the circumstances above indicated. This proceeding being by summary process, and not a plenary suit, as it should have been, there was no way in which Comingor could have formally pleaded these matters. But the court in bankruptcy directed and ordered its officer to enter appearance and become party to the state court suit for the purpose of obtaining the judgment of the state court. The officer of the court in bankruptcy acted under the supervision of the court, and the fund obtained by him was taken into the court in bankruptcy, all of which appears in its records.

It must also be remembered that the record was closed before the referee, Comingor's responses had been adjudged insufficient, and rules made absolute and a petition for review had been filed, when the trustee in bankruptcy took the steps above indicated. The matter was then pending on a petition for review by the district court, on a record made up, and Comingor was enjoined

from taking any action in the state court, thus preventing him from showing the facts to that court.

Petitioner entered motions in the Circuit Court of Appeals below to dismiss the petition for review for want of jurisdiction, setting up that it is a question for appeal and not review; also moved to strike out, file answer and file an affidavit for certiorari and complains here because the court below overruled the motions. There is no provision in the Bankrupt Act for the filing of an answer to a bill of review.

The writ of certiorari goes to supply records on appeal where the records are made up and certified by the clerk below; but on bills of review involving only the review of questions of law, no record is made up but a petition is filed setting out the errors of law complained of.

> Bankrupt Act, 1898, Sec. 24b.
> Loveland's Law & Procedure in Bankruptcy, pages 665 and 666.

We are asserting no *claim* against the estate, and have always held, and are still holding, as *adverse claimants*, so that Section 25 of Bankrupt Act, 1898, covering appeals, does not embrace a case like ours.

> Loveland on Bankruptcy, page 668.

It is submitted that the judgment of the Circuit Court of Appeals ought to be affirmed.

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